UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 01029
Issued to: Johnny M. HARDEN

DECISION OF THE COMMANDANT
UNITED STATE COAST GUARD

2046

Johnny M. HARDEN

This appeal has been taken in accordance with Title 46 United State Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 6 February 1975, an Administrative Law Judge of the United States Coast Guard at St. Louis, Missouri, suspended Appellant's license for three months upon finding him guilty of negligence. The specification found proved alleges that while serving as operator of the towboat M/V POLLIWOG under authority of the license above captioned, on or about 22 September 1974, Appellant failed to take proper precautions to avoid a collision while navigating at about mile 764.4, Upper Mississippi River.

At the hearing, Appellant was represented by counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of several witnesses and certain documents.

In defense, Appellant submitted the case on the record made by the Investigating Officer and entered a pamphlet published by Commander, Second Coast Guard District, giving advise to recreational boat owners and operators.

At the end of the hearing, the Judge rendered a decision in which he concluded that the charge and specification had been proved. He then entered an order suspending all documents issued to Appellant for a period of three months.

The entire decision and order was served on 6 February 1975. Appeal was timely filed, and perfected on 25 August 1975.

FINDINGS OF FACT

On 22 September 1975, Appellant was serving on board M/V POLLIWOG and acting under authority of his license. On that date, POLLIWOG was proceeding up the Upper Mississippi River pushing a tow of four loaded and three unloaded barges. The three unloaded barges formed across the head of the tow. The loaded barges were in two tiers of two the tug faced up to the port loaded

barge in the near tier. Each of the barges was about one hundred ninety five feet long. The distance from the pilothouse of POLLIWOG to its bow was about fifteen feet, giving an overall distance from the
house to the forward end of the tow of about six hundred feet. The height of eye of the operator was about 22.5 feet above water and the forward end of the tow had a freeboard of about eight to nine feet. There was thus a blind spot for the operator in the wheelhouse of about 360 feet forward of the head barge.

The day, a Sunday, was clear and bright. The breeze was moderate. The tow was making 4-5 miles per hour on its own right hand side of a marked channel. When Appellant assumed the operator duties from the captain at about 1140, the vessel had, about four miles downriver, passed a regatta. At 1140 and thereafter from five to nine small craft were in sight at all times. The captain left the pilothouse on relief but two deckhands, on duty, were in the pilothouse. No one else was on duty above deck anywhere forward of the wheelhouse. No duties were assigned to the deckhands.

At about 1200, a pleasure boat pulled alongside and an occupant reported to Appellant that the tow had run over another small boat. Appellant immediately stopped the tug's engine and backed down. The small craft that had been run over surfaced upside down.

That boat was a 14 foot open, aluminum craft with a 7.5 HP outboard motor which had been rented for the time by one George Williams who died of drowning as a result of the collision.

Prior to the collision, the Williams boat had been observed by another pleasure craft operator. The boat, with only one person aboard, was motionless, about 200 yards downriver from a red buoy in about mid-channel. The tow was 200-300 yards further downriver. The other operator signalled attention to the tow to Williams, who appeared to look toward the tow. The other vessel proceeded downstream, but other observers in other recreational boats saw no motion by William as the tow approached him. Another recreational boat operator thought he saw a movement by Williams toward his motor when the head of the tow was about 15-30 yards away from him. One of the lead barges of the tow struck and ran over the Williams boat with the results described above.

During this time, no one aboard the tow noticed the Williams boat at all, and no signal of any kind was given by the tow. Radar aboard POLLIWOG was not in use or operation.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is urged that there was no duty on Appellant to post a lookout on the lead barge of the tow and that Appellant was therefore not negligent in failing to have such a lookout posted.

APPEARANCE: Swank, Lane and Associates, Greenville, Mississippi, by Joel J. Henderson, Esq.

OPINION

I

In evaluating the conditions which might reasonably be expected to be encountered by an operator in Appellant's position, the Administrative Law Judge notes that a "14" outboard fishing boat...is not required to have 'an efficient whistle or other sound device'. (Motorboat Act of 1940, as amended, 46 USC 526, et seq.)" While the description given of that craft ("14' open aluminum boat with pointed bow and powered by a 7-1/2 horsepower outboard motor") does not identify it further by either name, ownership, or number, it is inescapable from the tenor of the record that it was a vessel used exclusively for pleasure and, as an undocumented machine-propelled vessel, required to be numbered. From all considerations it was a "boat" within the meaning of 46 U.S.C. 1452, and as such was not subject to the statutory definition of "motorboat" at 46 U.S.C. 526 or the provisions of the Motorboat Act relative to lights and equipment: 46 U.S.C. 526b and c, since those sections of that Act are rendered inapplicable to "boats" by 46 U.S.C. 526 u, as amended in 1971.

II

At the outset of the hearing the Administrative Law Judge denied a motion of the Investigating Officer to amend the word "wrongfully" in the specification of negligence to "negligently." When Counsel objected on the grounds that the case had been prepared, during some period of time, on the understanding that the act alleged was asserted to be "wrongful" rather than "negligent," the Administrative Law Judge noted that there was no substantive difference between the two adverbs in question (as, in the context, there was not) but that, since "fact pleading" is the rule and the descriptive term was mere surplusage, the motion should be denied although the objection was irrelevant. Counsel was permitted to defend against a theory of "wrongful" rather than "negligent" act. What was not noted was that as a statement of actionable facts, the allegation was insufficient. Apart from the catch-all phrase "failed to take proper precautions," curably objectionable for lack of specificity, it alleged that the failure was to take precautions "to avoid a collision." No collision was alleged and no fact circumstances were recited to indicate the propriety of taken special precautions or "proper" precautions, to avoid one. The issue was litigated, however, with no complaint of lack of notice, and the findings, eminently supported by the record, furnish the relevant facts that Appellant's two struck an open boat at the time and place in question, with the resultant death of the occupant of the boat. On the whole record, the deficiency does not amount to error.

III

This case was heard, despite the initial deficiencies of the specification, under the theory that Appellant's negligence, if any, was in failing to maintain a proper lookout.

The disturbing factor in this case is a publication named RIVERWAYS, issued by the Commander, Second Coast Guard District. It is addressed to the pleasure boat owner. Across the bottom of two joined and folded sheets of the pamphlet is a warning: "A TOWBOAT OPERATOR'S

VISION IS BLOCKED AHEAD FOR SEVERAL HUNDRED FEET...STAY CLEAR." A sketch across under the words shows in profile a towboat pushing a line of four barges, with a line of sight drawn from an eye-level at the towboat's wheel house, tangent to the uppermost point of the cargo heaped on the lead barge, and thence continued to the water surface ahead. This was placed in evidence by Appellant.

Great stress was placed in the decision in this case on the size of the "blind spot" for Appellant on the surface of the water before him. The distance, I find, is from 370 to 400 feet from the head of the tow, looking dead ahead, and about 400 to 429 feet from the corners of the lead barges, the arc of blindness for the surface being about nine degrees. It requires no computation to perceive that a person stationed near the head of the lead barge, looking forward, would have relatively no area of "blindness" at all. When the argument was presented that it was the regular practice of tows to operate by daylight in good weather with good visibility in the River section where the collision occurred with no person stationed forward, the Administrative Law Judge invoked the principle that custom or practice cannot justify non-compliance with a statutory command.

It is true the statute does not in terms command a lookout. It accepts as necessary practice the use of someone in an appropriate position to detect dangers ahead while collision can be averted. The statute declare that "nothing in these rules shall exonerate..." from the failure to have a lookout, but Appellant is not relying on compliance with one or another rule in the statutes to discharge him from any duty. Nevertheless, the courts have generally accorded to the failure to maintain a special lookout the status of non-compliance with a direct command in the rules, that of "statutory fault." While the considerations involved in an action under R.S. 4450 are to a great extent different from those involved in a civil determination of fault and extend of liability (as seen in the Administrative Law Judge's correct rejection of negligence of the other vessel as tending per se to absolve Appellant of fault), it is apparent that what amounts to "statutory fault" in civil collision litigation is prima facie negligent conduct in these proceedings.

The publication, "RIVERWAYS," however, points up a need to examine closely the concept that every "failure to have a lookout" is of itself a negligent fault.

Of the four non-exculpatory considerations of Article 26, the neglect to carry lights or signals immediately associates itself with direct commands of the Rules of the Road. The third and fourth ("ordinary practice of seamen" and "special circumstances of the case") plainly deal with precautions the concepts of which are practically innate ideas for the prudent seaman. It seems that the failure to keep a lookout is somewhere the two, not absolutely identifiable as covered by direct command, a more specific duty than a general precaution, but equated to a statutory command under the critical test of "proper." What is a "proper" lookout is a function of the circumstances, it seems, although more easily ascertained that some duties that might conceivably arise under the general dictates of "special" circumstances. Thus the question here is not merely whether a custom or practice of boatmen may be urged against observance of a duty explicitly imposed by statutory law but whether a custom or practice is so regarded that its observance may at some duties that might conceivably arise under be accepted as "proper" under the circumstances of the case. In terms of the instant case,

the question is whether the Coast Guard pamphlet constitutes an open recognition of the propriety at times of operating a river tow with the person responsible for keeping lookout in the wheelhouse rather than near the head end of the tow and of the acceptability under the Rule of the practice that was testified to.

The pamphlet shows a tow with a "ling" area before it. This constitutes a warning to persons in small craft that it can be expected that a person guiding a tow may be handicapped in detecting a small vessel encountered too closely ahead. It is a clear warning to small craft operators to stay clear of a tow made up for normal river work. There is not a hint that the operation of the tow may be, for that very reason, improper, unlawful, or negligent.

At the same time, there is no contention made that Appellant at the time of the casualty, or even at the hearing itself, relied upon the pamphlet as condoning the use of the operator-pilot alone, stationed in the wheelhouse, as "lookout" under any set of conditions. On the record presented, in the absence of evidence that any person on duty on the tow was designated as a lookout and in the absence of even a claim by Appellant that he himself was acting as operator and adequate lookout, the sole inference that may be supported is that POLLIWOG's tow was operated with no lookout at all.

Thus viewed the solution to the problem is simple. No great weight need be attributed to the pamphlet produced by Appellant. Directed as a warning to small pleasure-craft operators that for their own safety they should beware of impeded vision from oft-to-be-encountered tows in the rivers, and disregarded as it obviously was by the deceased in this case, it does not define an interpretation of the law that at all times, or even under some one ideal set of circumstances, a tow bay be navigated without a lookout or even with a lookout located in the wheelhouse. Just as the statutory law does not attempt to prescribe a point a point in space for location of a lookout's eyes and ears, the pamphlet does not specify that for a tow on the Mississippi River system a lookout is properly placed in a pilothouse.

Just as in a court, the test here must take in all the circumstances and all the occurrences in evaluating Appellant's conduct. There is no room for doubt that a proper lookout stationed well forward (as could easily have been done in view of the weather and the number of persons available) would have been effective in preventing collision with a motionless boat. There is a strong probability that even stationed elsewhere a lookout could have served to avert the collision, and there is a likelihood that an alert lookout even in the wheelhouse could have been effective. The fact simply is that no one was assigned as lookout, no one performed as lookout, and there was just no lookout kept. The affirmative proof of fault was the failure to constitute anyone as lookout; the negative proof is that a fatal collision occurred which could not conceivably have happened, barring actual intent, had there been an adequate lookout.

The general rules of navigation call for adequate lookout and the general standards of prudent navigators determine as negligent the operator or pilot who in the most favorable conditions of weather and visibility runs into a craft encountered in the usual course of operation without even

being aware of its existence.

CONCLUSION

It is concluded that Appellant was negligent in his failure to have an adequate lookout while operating POLLIWOG and its tow into a fatal collision.

ORDER

The order of the Administrative Law Judge dated at St. Louis, Missouri, on 6 June 1975, is AFFIRMED.

E. L. PERRY
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 23rd day of Jan. 1976.

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